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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LYNN GUZEY,

Plaintiff and Appellant,

v.

HOWARD A. KAPP et al.,

Defendants and Respondents.

B159517

(Los Angeles County  
Super. Ct. No. SC067167)

APPEAL from the judgment of the Superior Court of Los Angeles County. Linda K. Lefkowitz, Judge. Affirmed.

Lynn Guzey, in pro. per., for Plaintiff and Appellant.

Howard A. Kapp, in pro. per., for Defendants and Respondents.

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## SUMMARY

This action arises from three prior lawsuits involving appellant Lynn Guzey and her former attorney, respondent Howard A. Kapp, dating back to 1996. In this action, Guzey sued Kapp for malicious prosecution based upon a prior malicious prosecution action Kapp filed against Guzey. The latter action followed a legal malpractice action brought by Guzey against Kapp.

Guzey appeals from a grant of summary judgment in Kapp's favor in the malicious prosecution action. She asserts the trial court abused its discretion in failing to grant her continuance request to oppose Kapp's motion for summary judgment. Additionally, she contends triable issues of fact exist regarding both probable cause and favorable termination in the underlying malicious prosecution action brought by Kapp against Guzey.

We conclude the court did not abuse its discretion in denying Guzey's continuance request. Furthermore, Guzey failed to demonstrate any triable issues of fact concerning whether the prior malicious prosecution action was pursued to a legal termination in Kapp's favor or whether Kapp's action was brought without probable cause. Accordingly, we affirm the judgment.

## FACTUAL, LEGAL AND PROCEDURAL BACKGROUND

This action for malicious prosecution is the fourth in a series of related lawsuits.

### **A. The First Action for Medical Malpractice: Guzey v. Isenberg and Regents of the University of California**

In 1980, Sherwin J. Isenberg M.D., an ophthalmologist employed by the Regents of the University of California at the U.C.L.A. Jules Stein Eye Institute, performed eye surgery on Guzey's left eye for an alleged focusing problem. Following the surgery, Guzey claimed she experienced "ongoing, intermittent problems with her left eye." Isenberg's surgery also caused her to experience "double vision, pain and extraordinary fatigue." However, when Guzey returned to Isenberg for reexamination, he told her that "everything was fine." Guzey accepted his reassurances. For several years, Guzey

continued to see Isenberg for checkup treatments. During these checkups, Guzey continued to complain about her condition. Isenberg repeatedly told her “everything was fine,” and “nothing more could be done.” On June 20, 1991, Guzey filed a medical malpractice action against Isenberg. The lawsuit was filed by attorney Donald E. Karpel. In 1993, Guzey substituted attorney Howard A. Kapp to represent her in the medical malpractice action.

On February 2, 1995, the Regents moved for summary judgment claiming Guzey’s action was barred by the statute of limitations. Code of Civil Procedure section 340.5 requires a plaintiff to file an action within one year following actual or constructive discovery of injury, unless the period is tolled by fraud, intentional concealment, or the presence of a foreign body. The Regents claimed Guzey had discovered by 1989 the alleged problems resulting from the eye surgery, citing as evidence two letters Guzey wrote suggesting she believed Isenberg had committed malpractice.<sup>1</sup> Despite writing these letters in 1989, Guzey did not file her claim until 1991, two years after her suspicion arose concerning Isenberg’s malpractice. When he received the Regents’ motion, Kapp concluded Guzey’s claim lacked merit. Kapp related his views to Guzey and asked her to consent to his withdrawal as her counsel. Kapp nonetheless prepared and filed a “technical opposition” to the motion, which he believed might stall the ultimate outcome. However, the court found Guzey’s two letters triggered the one-year medical malpractice statute of limitations in 1989 and granted the Regent’s motion for summary judgment.<sup>2</sup>

Kapp moved to withdraw as Guzey’s counsel after the summary judgment hearing. One week later, Kapp’s motion to withdraw was granted. Thereafter, Guzey, acting as her own attorney, moved for reconsideration of the summary judgment. The motion was denied. Guzey appealed.

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<sup>1</sup> The two letters written to Richard Kratz, M.D., and Jay Richlin, M.D., complained about Isenberg’s 1980 eye surgery.

<sup>2</sup> By this time, the Regents were the only remaining defendant.

## **B. The Second Action for Legal Malpractice: Guzey v. Kapp**

During the pendency of her medical malpractice appeal, Guzey sued Kapp for legal malpractice. Guzey alleged Kapp negligently represented her by proposing to “abandon” her during her previous summary judgment proceedings when he asked Guzey to consent to his withdrawal as counsel. Guzey claims Kapp negligently failed to assert that Isenberg fraudulently concealed the treatment that was available to correct Guzey’s medical problems. Moreover, she claims Kapp failed to present documentation, consisting of Guzey’s medical records and authoritative medical texts, which would have shown Isenberg’s awareness of the available treatment. As evidence of Isenberg’s fraudulent concealment, she claims this documentation would have defeated the motion for summary judgment.

Kapp moved for summary judgment, contending that there was no triable issue he had committed malpractice, and the action was barred under the one-year statute of limitations for legal malpractice. The trial court granted summary judgment in Kapp’s favor and ruled there was “no showing of malpractice, because the medical case had clearly been barred, as determined.” Additionally, Guzey failed to offer expert evidence regarding the standard of care and Kapp’s breach of the standard. On the other hand, the court found Kapp’s declaration recounting the history and rationale for his conduct during the summary judgment proceedings in the medical malpractice case, including his decision to withdraw, satisfied the standard of care. The court found that Kapp’s negligence could not be ascertained from the circumstances. Guzey appealed.<sup>3</sup>

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<sup>3</sup> On July 30, 1998, the Court of Appeal rejected Guzey’s appeal of the summary judgment granted in her legal malpractice case against Kapp.

On October 22, 1997, the Court of Appeal affirmed the trial court's grant of summary judgment in the first medical malpractice action. The court stated there was no evidence of "fraudulent concealment," sufficient to toll the statute of limitations.<sup>4</sup>

**C. The Third Action for Malicious Prosecution: Kapp v. Guzey**

After the denial of Guzey's petition for rehearing in the Court of Appeal and petition for review to the Supreme Court of California in the legal malpractice action, Kapp sued Guzey for malicious prosecution of the legal malpractice action.<sup>5</sup> Kapp submitted a statutory demand upon Guzey under Code of Civil Procedure section 998 for \$98, which Guzey rejected. In response, on June 19, 2000, Guzey filed a motion for summary judgment, comprising nearly 1,000 pages and 115 exhibits, and consisting of 8 inches of written material. An hour after receiving the motion, Kapp notified Guzey he was dismissing the action. The parties agree the dismissal was voluntary.

**D. This Action for Malicious Prosecution: Guzey v. Kapp**

Guzey filed this action for malicious prosecution against Kapp on June 21, 2001. Three months later, Kapp demurred to the verified complaint because it disclosed the dismissal was not on the merits. Instead, Kapp had dismissed the action based on the economics of pursuing it, including the anticipated number of hours anticipated to oppose Guzey's voluminous motion for summary judgment.

On November 20, 2001, the trial court sustained the demurrer with "20 days leave to amend to allege a favorable termination in the underlying action." On December 7, 2001, Guzey filed a First Amended Verified Complaint. In lieu of answering the complaint, however, Kapp moved to strike the entire complaint. He also moved summary judgment, which is the subject of this appeal.

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<sup>4</sup> Guzey's evidence included certain exhibits of her medical records and a number of medical texts, intended to show Isenberg's awareness of corrective treatment that he did not offer to Guzey.

<sup>5</sup> Kapp sued Guzey on October 21, 1998.

The motion for summary judgment alleged: (1) probable cause existed for Kapp's filing the third action for malicious prosecution action, and (2) no favorable termination of the action in Guzey's favor occurred. When Guzey filed her opposition to the motion on February 21, 2002, she requested a continuance of the hearing on the motion in order to conduct further discovery. Kapp filed a reply to the opposition.

Guzey filed additional documentation on March 5, 2002.<sup>6</sup> At the time of the summary judgment hearing two days later, Guzey attempted to lodge an additional 1,544 pages of documents, which the court rejected.<sup>7</sup> At the hearing, the motion was taken under submission. Later the same day, the court filed a 9-page minute order denying Guzey's request for a continuance and granting Kapp's motion for summary judgment.<sup>8</sup>

Kapp formally requested a ruling on the evidentiary objections filed in opposition to Guzey's motion for summary judgment in order to perfect the record in the event of an appeal. On April 2, 2002, the trial court nunc pro tunc amended the March 7, 2002 order to correct a "clerical error" in its failure to rule upon extensive evidentiary objections by Kapp to Guzey's 99-paragraph declaration in opposition to the motion for summary

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<sup>6</sup> Guzey filed a an 18-page declaration in response to Kapp's formal objections to alleged evidence offered by Guzey in opposition to motion for summary judgment.

<sup>7</sup> The summary judgment hearing was scheduled for March 7, 2002.

<sup>8</sup> Kapp's motion to strike therefore was rendered moot. The trial court's minute order stated, "The court has also considered plaintiff's request for a continuance of this summary judgment motion, a motion entitled to substantial consideration in light of the early state of this proceedings. [Citation.] However, to obtain a continuance of a summary judgment motion at any state of the proceedings, the requesting party must by declaration make a showing of facts establishing a likelihood that controverting evidence may exist, the reasons why the evidence cannot be presented, and what steps would be utilized to obtain the evidence. [Citation.] No such showing has been made here, nor any explanation why, in the face of defendant's November letter advising of his intent to seek an early summary judgment ruling, she did not then engage in related discovery . . . . Moreover, in light of the extent of litigation between the parties and the records available of prior proceedings, the necessity for extended discovery, particularly upon the issue of probable cause, appears minimal. For these reasons the motion to continue the summary judgment motion is denied."

judgment. Kapp had interposed 74 separate objections, of which 62 had been sustained. Guzey contends that sustaining 7 of 62 objections reflected the existence of a triable issue of fact. Ultimately, on April 12, 2002, the trial court issued an order granting summary judgment in favor of Kapp, stating, “After full consideration of the evidence and points and authorities . . . and oral arguments of counsel, it appears and the Court finds that there is no triable issue of material fact in this action and that the moving parties [Kapp] are entitled to summary judgment as a matter of law.” This appeal followed.

### **STANDARD OF REVIEW**

Summary judgment is properly granted when no triable issues of material fact exist entitling the moving party to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion, except properly excluded evidence and the uncontradicted inferences reasonably supported by the evidence. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 622, citing *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) At the trial court, once a moving defendant shows that one or more elements of a cause of action cannot be established, the burden shifts to the plaintiff to show the existence of a triable issue. To meet that burden, the plaintiff must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (c).) In reviewing the evidence, all reasonable inferences are construed in the light most favorable to the opposing party. (*Swat-Fame, Inc. v. Goldstein, supra*, 101 Cal.App.4th at p. 622.)

### **DISCUSSION**

A claim for malicious prosecution is actionable because it harms the individual against whom the claim is made and threatens the efficient administration of justice. The harm arises because the individual is compelled to defend against a fabricated claim commenced out of spite or ill will. (*Stevens v. Chisholm* (1919) 179 Cal. 557, 564.) The judicial process is adversely affected by the claim because it unnecessarily congests the

courts. (*Ibid.*) As a consequence, malicious prosecution is a disfavored action. (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 566.) However, when the elements of a malicious prosecution action are proved, a plaintiff is not precluded from relief. (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 159 (*Jaffe*).)

To establish a cause of action for malicious prosecution, a plaintiff must demonstrate the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1854 (*Eells*), citing *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel Co.*).) In this appeal, we are concerned with two elements of malicious prosecution: favorable termination and lack of probable cause.

**1. Kapp's voluntary dismissal of his claim against Guzey did not constitute favorable termination.**

In order to maintain an action for malicious prosecution, a plaintiff must first demonstrate a favorable termination of the prior litigation. (*Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 827.) This requirement is an essential element of the tort of malicious prosecution, and is strictly enforced. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 27, 29.) The theory underlying the requirement of a favorable termination is that it tends to indicate the innocence of the accused. (*Eells, supra*, 36 Cal.App.4th at p. 1854, citing *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750-751.) If the outcome of the underlying litigation leaves a doubt as to the defendant's innocence or liability, the favorable termination element is not satisfied.<sup>9</sup> (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.)

Voluntary dismissal is considered a "favorable termination" when the prosecuting party lacked merit to bring the claim or, if pursued, the claim would have resulted in a decision in favor of the defendant. (*Eells, supra*, 36 Cal.App.4th at p. 1855, citing

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<sup>9</sup> Underlying litigation refers to Kapp's suit against Guzey for malicious prosecution.



*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.) The key issue is whether the termination reflects upon the merits of the case. (*Stanley v. Superior Court* (1982) 130 Cal.App.3d 460, 464-465.) A voluntary dismissal may constitute an implicit concession that the dismissing party cannot maintain the action, thereby indicating a favorable termination on the merits. (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 888.) However, it is insufficient merely to show that the proceeding was dismissed. (*Jaffe, supra*, 18 Cal.2d at p. 150.) Instead, the court must evaluate the reasons underlying the dismissal to determine whether the termination was based on the merits of the case. (*Eells, supra*, 36 Cal.App.4th at p. 1855, citing *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 343; *Lumpkin v. Friedman* (1982) 131 Cal.App.3d 450, 455; *Kennedy v. Byrum* (1962) 201 Cal.App.2d 474.)

The trial court concluded Kapp “voluntary dismissed” his malicious prosecution action against Guzey within hours of receiving her extensive summary judgment motion. Kapp argued he dismissed his suit against Guzey based solely on the economics of devoting his resources to opposing her voluminous motion for summary judgment. Additionally, Guzey’s in forma pauperis status made any collection of payment unlikely in the event he obtained a favorable judgment. Guzey admits that Kapp’s law clerk told her within hours after Kapp’s office received her summary judgment motion, and soon thereafter by letter, that Kapp would dismiss the case because of the time involved in drafting an opposition to Guzey’s summary judgment motion. Guzey argues that Kapp’s reasons for dismissing the underlying case present factual questions for a jury to decide. We disagree.

California summary judgment law requires that the moving party bear the burden of showing the nonexistence of any material facts. To the extent a moving defendant meets this burden, the burden shifts to the plaintiff to make a prima facie showing of the existence of a genuine issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) In this case, Kapp set forth a supportable economic rationale for the dismissal of his summary judgment motion. His dismissal was voluntary and directly related to his estimated 50 to 100 hours of work required and imputed costs of “\$12,500

to \$25,000” in opposing Guzey’s 1,000-page motion. Kapp’s economic rationale for dismissal shifted the burden to Guzey to demonstrate a triable issue of material fact. Guzey, however, failed to show any persuasive non-economic reason for Kapp’s voluntary dismissal. We find no conflicting evidence as to an alternative motive for the dismissal. Accordingly, the trial court properly found it was based on economics and not the merits of the case. Because Guzey failed to establish that Kapp’s underlying cause of action for malicious prosecution terminated in her favor, Kapp’s motion for summary judgment in the instant action was correctly granted on that basis alone.

**2. Kapp established probable cause for the filing of the prior malicious prosecution action.**

The probable cause element of a malicious prosecution action requires an objective determination by the trial court of the “reasonableness” of the defendant’s prior action. This determination is based on facts known to the defendant at the time the prior action was instituted. (*Sheldon Appel Co., supra*, 47 Cal.3d at pp. 868, 886.) In a malicious prosecution action, the trial court must determine that the prior action was brought without probable cause. If the court determines there was probable cause to institute the prior action, the claim for malicious prosecution must fail. (*Id.* at p. 875; (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 567, citing *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 640.)

An account of the legal relationship between the parties is essential to the determination of probable cause in this claim for malicious prosecution. First, Guzey filed the action for medical malpractice arising out of an alleged negligent ophthalmic surgery. She based her subsequent legal malpractice claim against Kapp on his failure to properly defend her against the Regents’ summary judgment motion. The motion involved a statute of limitations bar resulting from two letters Guzey sent to various physicians, which both the trial court and the Court of Appeal determined was sufficient to trigger the one-year statute of limitations. (Code Civ. Proc., § 340.5.) Guzey then based her legal malpractice claim against Kapp on his failure to include certain medical documentation in opposition to the summary judgment motion in order to toll the statute

of limitations.<sup>10</sup> However, she failed to obtain any expert opinion to substantiate her claim against Kapp for legal malpractice. Guzey lost the legal malpractice claim against Kapp. Kapp then filed a malicious prosecution action against Guzey based on the previous lawsuit. (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 881.) The trial court noted, “from the filing of her legal malpractice case in 1996 to date, [Guzey] has been unable to obtain any expert opin[ion] upon the negligence of the defendant in the performance of his legal duties on her behalf.”

We conclude Kapp did not negligently represent Guzey as counsel in the first medical malpractice action. Guzey’s claim in the second action for legal malpractice was therefore without merit. Subsequently, probable cause existed for Kapp to file the third action for malicious prosecution against Guzey.

**3. Denying Guzey’s motion for continuance was not abuse of discretion.**

Guzey contends the trial court abused its discretion in denying her motion for continuance. This claim is unpersuasive. Granting or refusing a continuance is a matter within the discretion of the trial court. (*Beck v. Reinholtz* (1956) 138 Cal.App.2d 719, 722, citing *Vallera v. Vallera* (1946) 73 Cal.App.2d 466, 471.) Therefore, the trial court’s decision will be reversed only on a showing of an abuse of discretion. (*Beck v. Reinholtz, supra*, 138 Cal.App.2d at p. 722, citing *Ferrari v. Mambretti* (1945) 70 Cal.App.2d 492, 496.)

The trial court properly considered and denied Guzey’s request for a continuance. To obtain a continuance of a summary judgment motion, the requesting party must make a showing by a declaration that facts essential to justify an opposition may exist, the reasons why the facts cannot be presented at that time, and what steps would be utilized to obtain the evidence if a continuance were granted. (Code Civ. Proc., § 437c (h).) We

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<sup>10</sup> However, the Court of Appeal later reviewed the evidence, which included certain exhibits of Guzey’s medical records and a number of medical texts. The court determined that the evidence would not have defeated the summary judgment motion as evidence of fraudulent concealment as Guzey claimed.

agree with the trial court that Guzey made no showing that additional evidence existed, and gave no explanation why she did not engage in related discovery within the proper time period. Considering the extensive litigation between the parties, Guzey's need for additional time for discovery on the issue of probable cause is not persuasive. For these reasons, the trial court did not abuse its discretion.

### **DISPOSITION**

The judgment is affirmed. Howard A. Kapp is to recover his costs on appeal.

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BOLAND, J.

We concur:

RUBIN, Acting P.J.

FLIER, J.